Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

JACOB WINKELMAN *et al.*, *Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented, over which there is a three-way split among six circuits, is:

Whether, and if so, under what circumstances, non-lawyer parents of a disabled child may prosecute an Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 *et seq.*, case *pro se* in federal court.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Jeff Winkelman and Sandee Winkelman are petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jacob Winkelman, by and through his parents, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman respectfully petition for a writ of certiorari to review the interlocutory order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-2a) is unreported. The district court's unreported memorandum of opinion (App., *infra*, 3a-23a) is available at 2005 WL 1315728.

STATEMENT OF JURISDICTION

The district court entered judgment for respondent on June 2, 2005. App., *infra*, 3a-23a. The court of appeals' interlocutory order dismissing petitioner's appeal was entered on November 4, 2005. *Id.* at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1415(i)(2)(A) of the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides:

> Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

STATEMENT

Petitioners Jeff and Sandee Winkelman (the Winkelmans), neither of whom is a lawyer, are the parents of petitioner Jacob Winkelman, a now-eight-year old boy afflicted with autism spectrum disorder. Petitioners brought this action under the IDEA to challenge the appropriateness of the special-education program offered by respondent for Jacob and to vindicate various procedural violations of the IDEA committed by respondent and the Ohio administrative hearing officer who presided over petitioners' administrative-level proceedings. The district court entered judgment for respondent after finding that neither respondent nor the hearing officer violated the IDEA. On appeal, but before any briefing of the merits, the court of appeals dismissed petitioners' appeal because

petitioners were prosecuting their appeal *pro se*. Petitioners seek this Court's review because the court of appeals' decision squarely conflicts with the decisions of five other courts of appeals and wrongly decides an important and recurring issue.

A. Statutory Framework

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities. Under the IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education" (FAPE), which includes special-education and related services necessary to meet the child's particular needs. 20 U.S.C. § 1400(d)(1)(A) & 1412(a)(1)(A). Local school systems are required to develop an individualized education program (IEP) for each child with a disability in accordance with statutory requirements. *See* 20 U.S.C. § 1412(a)(4).

The heart of the IDEA system, however, is the set of procedural safeguards that states and localities are required to accord to "children with disabilities and their parents" in order to ensure the provision of a FAPE. 20 U.S.C. § 1415(a); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982) ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, * * * as it did upon the measurement of the resulting IEP against a substantive standard."). "Parents and guardians play a significant role in the IEP process." *Schaffer v. Weast*, 126 S. Ct. 528, 532 (2005). For example, parents are given access to all relevant records, *see* 20 U.S.C. § 1415(b)(1)(A), and parents must be given full written notice in advance of any change (or refusal to

change) a child's educational services, *see* 20 U.S.C. § 1415(b)(3).

If parents are not satisfied with the IEP offered by their local education agency, they can file a complaint with the State or local educational agency, and they are entitled to "an impartial due process hearing" conducted "by the State educational agency or by the local education agency." 20 U.S.C. § 1415(b)(6) and (f)(1). Among other procedural safeguards at the hearing, parents have the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities * * * [and] the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. § 1415(h). "Any party aggrieved" by a decision at the final state administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. § 1415(i)(2)(A).

Ultimately, as this Court stated in *Rowley*, parental involvement is the key to the enforcement of the statutory scheme. "[P]arents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled under the Act," by participating in the formulation of their child's IEP and by undertaking the complaint procedures, beginning with the administrative process and culminating, in appropriate cases, in proceedings in federal court. *Rowley*, 458 U.S. at 182 & n.6, 207, 208-09.

B. Factual and Procedural Background

Beginning in July 2001, Jacob attended preschool at the Achievement Center for Children (ACC) because Jacob did not respond well to respondent's preschool program. App., *infra*, 4a. The Winkelmans and respondent agreed that ACC was an

appropriate placement for Jacob's preschool education for the 2001-02 and 2002-03 school years. *See id.* at 4a.

On June 2, 2003, the Winkelmans and respondent's officials met to discuss Jacob's IEP for the 2003-04 school year – Jacob's kindergarten year. *See id.* at 5a. Respondent proposed an IEP that would educate Jacob in a special education classroom at one of respondent's elementary schools. *See id.* This proposal was not acceptable to the Winkelmans. *See id.* Specifically, the Winkelmans were concerned that the proposed IEP did not contain a specific plan to implement occupational therapy, did not contain a sufficient amount of speech therapy or one-on-one instruction, and did not include music therapy. *See id.*

On June 2, 2003, the Winkelmans filed a request for a due process hearing with respondent's superintendent alleging that the 2003-04 IEP proposed by respondent failed to provide Jacob with a FAPE.[1] *See id.* Meanwhile, the Winkelmans enrolled Jacob at the Monarch School (Monarch), a school that specializes in educating autistic children, where "Jacob performed well" during the 2003-04 school year. *Id.* However, because Monarch's $56,000 annual tuition was prohibitively expensive,[2] the Winkelmans did not enroll Jacob at Monarch

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[1] The IDEA provides that when parents allege that their local school district has denied their disabled child a FAPE,

> the parents * * * shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

20 U.S.C. § 1415(f)(1); *see also* Ohio Rev. Code § 3323.05(D) & (E).

[2] Jacob's sister, Jenna, also suffers from autism. Due to Mrs. Winkelman's disability and the time required to care for Jenna and Jacob, (continued...)

for the 2004-05 school year and instead educated him at home with supplementation from a one- to two-hour per week outreach program at Monarch. *See id.*

On February 25, 2004, the Impartial Hearing Officer (IHO) selected to preside over the Winkelmans' due process hearing issued a decision finding that respondent provided Jacob with a FAPE. *See id.* at 6a. The Winkelmans appealed to the State Level Review Office (SLRO), which on June 2, 2004, issued a decision affirming the IHO's earlier decision. *See id.* Petitioners were represented by counsel before both the IHO and SLRO.

Dissatisfied with the results of the administrative proceedings, on July 15, 2004, petitioners filed this action in the United States District Court for the Northern District of Ohio challenging the IHO's and SLRO's decisions that respondent had provided Jacob with a FAPE and alleging that respondent and the IHO had violated their procedural rights under the IDEA. *See id.* In total, petitioners alleged three procedural violations and three substantive violations of the IDEA. *See id.* at 7a. Specifically, petitioners alleged that their procedural rights were violated (1) when respondent predetermined to place Jacob in its own program "without meaningful input by Jacob's parents" prior to developing his 2003-04 IEP,[3] Compl. ¶ 21; *see also* Pet. Mot. S.J. at 6-8; App.,

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[2] (...continued)
the Winkelmans' household income is less than $40,000 per year. They have no savings, face a monthly mortgage payment of $1,300, and incur significant medical expenses for Jacob and Jenna. Because the Winkelmans are unable to afford counsel, *see* Pet. C.A. Opp'n to Mot. to Dismiss 1, we represent petitioners on a *pro bono* basis. Similarly, the attorney who represented petitioners in a related state case, *J.W. v. Ohio Dep't of Educ.*, No. 05-087043 (Cuyahoga County 2005), did so on a *pro bono* basis.

[3] A school district violates the IDEA when it predetermines a child's placement and fails to give parents a "meaningful" opportunity to participate
(continued...)

infra, 10a; (2) when the IHO impermissibly allowed her research assistant to "co-preside" over the proceedings,[4] Compl. ¶ 23; *see also* Pet. Mot. S.J. at 5-6; App., *infra*, 7a; and (3) when the administrative proceedings lasted longer than the forty-five days allowed by the IDEA's implementing regulation,[5] *see* Compl. ¶ 23; Pet. Mot. S.J. at 5-6; App., *infra*, 8a. Petitioners alleged that Jacob's substantive right to a FAPE was denied because the 2003-04 IEP (1) did not contain specific goals and objectives for occupational therapy,[6] *see*

(...continued)
in the formulation of their child's IEP. *See, e.g., Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (CA6 2004) (holding that school district predetermined child's placement and violated parents' right to participate in IEP formulation process where school district refused to discuss parents' suggested alternative placement "even in the face of impressive results"); *see also W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (CA9 1992) (holding that school district violated IDEA when it independently developed a proposed IEP that would place the student in a preexisting, predetermined program and refused to consider other alternatives).

[4] The IDEA gives "state authorities * * * limited discretion to determine who conducts [due process] hearings." *Schaffer*, 126 S. Ct. at 532 (citing 20 U.S.C. § 1415(f)(1)). Ohio grants parents the right to participate in the selection of the hearing officer and to know the hearing officer's qualifications. *See* Ohio Admin. Code § 3301-51-08(D)(2) ("The office for exceptional children will send * * * a statement of the qualifications of each hearing officer * * * to both the parent and the district who will have the opportunity to agree upon a hearing officer."); *see also generally id.* § 3301-51-08(E) & (F).

[5] The IDEA's implementing regulations specify that "[t]he public agency shall ensure that not later than 45 days after the receipt of a request for a [due process hearing – (1) A final decision is reached in the hearing." 34 C.F.R. § 300.511(a); *accord*, Ohio Admin. Code § 3301-51-08(G)(3)(b)).

[6] Among other things, an IEP must include "a statement of annual goals, including short-term objectives [and] a statement of the specific educational services to be provided the child." 34 C.F.R. § 222.50. "[O]ccupational
(continued...)

Compl. ¶ 27; Pet. Mot. S.J. at 8-13; App., *infra*, 11a; (2) reduced Jacob's speech therapy from ninety minutes to sixty minutes and did not provide for one-on-one academic instruction,[7] *see* Compl. ¶ 26; Pet. Mot. S.J. at 13-14; App., *infra*, 16a-17a; and (3) did not include music therapy,[8] *see* Compl. ¶ 26; Pet. Mot. S.J. at 14-15; App., *infra*, 21a. On June 2, 2005, the district court granted judgment on the pleadings for respondent, essentially affirming the decisions of the IHO and SLRO. *See* App., *infra*, at 23a. Petitioners timely appealed.

On July 14, 2005, respondent filed a motion to dismiss petitioner's appeal because they were prosecuting the appeal *pro se*. *See id.* at 1a. On November 4, 2005, before any briefing of the merits of the appeal had been conducted, the

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[6] (...continued)
therapy" is a "related service[]" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. § 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including * * * occupational therapy * * *)" if the requested services are necessary "to assist a child with a disability to benefit from special education").

[7] "Speech-language pathology services" are also "related services" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. § 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including speech-language pathology services * * *)" if the requested services are necessary "to assist a child with a disability to benefit from special education"); *see also supra* note 6. The dispute between the parties over speech therapy and one-on-one instruction concerned whether the sixty minutes of speech therapy offered by respondent and the group instruction used in respondent's special education classroom were each "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *see also* App., *infra*, 16a-21a.

[8] Although not listed among the IDEA's examples of "related services," music therapy is, nonetheless, a "related service[]" that a school district must provide if necessary "to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A); *see also supra* note 6. The dispute between the parties over music therapy concerned whether Jacob needed music therapy to "receive educational benefits." App., *infra*, 21a-22a.

court of appeals granted the motion and, relying on its prior decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756-57 (CA6 2005), dismissed the entire appeal, notwithstanding that petitioners were asserting violations of both Jacob's substantive IDEA rights and the Winkelmans' procedural IDEA rights. *See* App., *infra*, 1a-2a. The court of appeals held, as it had in *Cavanaugh*, that the Winkelmans "are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*." *Id.*; *see also Cavanaugh*, 409 F.3d at 757(recognizing that it was furthering a circuit split and dismissing entire appeal because "any right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to a FAPE"). Rather than make its dismissal order effective immediately upon its issuance, the court of appeals stayed it for thirty days to enable petitioners to attempt to secure counsel. *Id.* at 2a ("[I]n conformity with *Cavanauh* [sic] * * * this appeal is dismissed unless within thirty days of the entry of this order an appearance of counsel is entered in this appeal to represent Jacob.").

On November 16, 2005, petitioners filed a motion with the court of appeals seeking an extension of the thirty-day stay to allow them to petition this Court for certiorari. After the court of appeals denied the motion on December 1, 2005, petitioners sought the same relief through an application to Justice Stevens in his capacity as Circuit Justice for the Sixth Circuit. No. 05A506. On December 2, 2005, Justice Stevens granted the application and stayed the court of appeals' November 4, 2005, order "pending the timely filing and disposition by this Court of a petition for a writ of certiorari." Justice Stevens' order provided that, if certiorari is denied, the "stay will terminate automatically fifteen days after the date of the order denying certiorari," or if certiorari is granted, "upon the sending down of the judgment of this Court."

This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law on which the circuits are avowedly and intractably divided. In the IDEA, Congress expressly provided that non-lawyer parents of a disabled child may prosecute their child's due process hearing *pro se*. *See* 20 U.S.C. § 1415(h) ("Any party to a [due process] hearing * * * shall be accorded – (1) the right to be accompanied and advised by counsel * * * [and] the right to present evidence and confront, cross-examine, and compel the attendance of witnesses"). There is a widely recognized three-way conflict among six circuits, however, over whether a non-lawyer parent's right to prosecute an IDEA dispute *pro se* carries-over to federal court and, if so, to what extent. This question recurs frequently because of the large percentage of parents with disabled children who are unable to obtain or afford a lawyer.

One court of appeals has held that there are no limitations on a parent's ability to prosecute an IDEA case *pro se* in federal court. Four circuits have limited a non-lawyer parent's ability to prosecute an IDEA case *pro se* by holding that counsel is needed to prosecute a child's substantive IDEA claims but not a parent's procedural IDEA claims. One circuit – the Sixth Circuit below here – has gone even further by holding that non-lawyer parents may not prosecute an IDEA case in federal court *pro se* under any circumstances and regardless of the nature of the IDEA claims being asserted. Although this Court declined several years ago to grant certiorari on the question presented, *see Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 123 (CA2 1998), *cert. denied*, 526 U.S. 1025 (1999); *Devine v. Indian River County School Board*, 121 F.3d 576 (CA11 1997), *cert. denied*, 522 U.S. 1110

(1998), this case is a better vehicle for this Court's review than either *Wenger* or *Devine*. *See infra* at 20.

Because only this Court can bring the required uniformity to how IDEA claims are litigated in federal court, and because the decision below is erroneous, certiorari should be granted.

I. THE CIRCUITS ARE IRRECONCILABLY DIVIDED OVER WHETHER, AND IF SO, UNDER WHAT CIRCUMSTANCES, NON-LAWYER PARENTS MAY PROSECUTE AN IDEA CASE *PRO SE* IN FEDERAL COURT

Six courts of appeals are intractably divided over whether, and if so, under what circumstances, non-lawyer parents may prosecute an IDEA case *pro se* in federal court. This division has resulted in a well-recognized 1-4-1 split. *See Mosley*, — F.3d —, 2006 WL 12982, *4 (CA7 Jan. 4, 2006) (cataloguing split); *Cavanaugh*, 409 F.3d at 756, 757 (applying the holdings of the Second, Third, Seventh, and Eleventh Circuits in part, while expressly rejecting the holding of the First Circuit); *Maroni v. Pemi-Barker Reg'l Sch. Dist.*, 346 F.3d 247, 249-50 (CA1 2003) (expressly disagreeing with the holdings of the Second, Third, Seventh, and Eleventh Circuits); *C.O. v. Portland Pub. Sch.*, — F. Supp. 2d —, 2005 WL 3507983, *8 (D. Or. Dec. 22, 2005) (cataloguing split); S. Rep. No. 108-185, 108th Cong., 1st Sess. 41 (2003) (noting split). Under this split, four court of appeals have limited parents' ability to prosecute an IDEA case *pro se* in federal court depending on the nature of the claims asserted, one court of appeals has placed no limitations on parents' right to do so, and one court of appeals – the court to which certiorari is presently sought – has imposed an absolute bar.

As discussed above, the IDEA confers both substantive and procedural rights for a disabled child and procedural rights for the child's parents. *See supra* at 3-4; *see also Mosley*, 2006

WL 12982, at *4. The Second, Fourth, Seventh, and Eleventh Circuits have all concluded that non-lawyer *pro se* parents may prosecute claims asserting violations of their own procedural IDEA rights but not claims alleging violations of their child's substantive IDEA rights. *See Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147, 1149 (CA7 2001) (per curiam) (holding that parent "was free to represent himself, but as a non-lawyer he has no authority to appear as [his child's] legal representative");[9] *Wenger*, 146 F.3d at 123, 126 (holding that "in federal court a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child" but a parent "is, of course, entitled to represent himself on his claims that his *own* rights as a parent under the IDEA were violated by the [school district's] failure to follow appropriate procedures"); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 233, 235 (CA3 1998) (holding that "the right to proceed *pro se* in federal court does not give non-lawyer parents the right to represent their children in proceedings before a federal court," but the IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court"); *Devine*, 121 F.3d at 581 n.17, 582 (holding that "parents who are not attorneys may not bring a *pro se* action on their child's behalf" but noting that a parent was also a plaintiff and, in appropriate circumstances, could be permitted to prosecute his case without counsel).

The First Circuit has rejected this approach. The First Circuit holds that parents may prosecute an IDEA case *pro se* – "regardless of whether the rights asserted are procedural or substantive" – because they are "parties aggrieved" within the meaning of § 1415(i)(2)(A) of the IDEA. *Maroni*, 346 F.3d at 250. Because "any party aggrieved" by a decision at the final

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[9] The Seventh Circuit recently reaffirmed *Navin* in a published decision. *See Mosley*, 2006 WL 12982, at *4 (citing *Navin* and stating, "We have no trouble concluding that a parent like Mosley may assert her own procedural rights.").

stage of administrative proceedings may "bring a civil action" in federal district court, 20 U.S.C. § 1415(i)(2)(A), parents in the First Circuit may prosecute both their own procedural and their child's substantive IDEA claims in federal court.

Significantly, however, petitioners' appeal does not reside in the First Circuit, where their entire appeal would be proceeding to briefing on the merits. Nor does their appeal reside in the Second, Third, Seventh, or Eleventh Circuits, where, because the Winkelmans had alleged their own procedural claims, at least part of their appeal would have been allowed to proceed to an evaluation of the merits. Petitioners' appeal lies in the Sixth Circuit, which has rejected the First Circuit's approach and imposed an absolute bar to *pro se* prosecution of an IDEA case that goes well beyond the more nuanced approach of the Second, Third, Seventh, and Eleventh Circuits. In the Sixth Circuit, a parent may not prosecute an IDEA case *pro se* regardless of the nature of the claims asserted because, in its view, "any right on which [a parent] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon [the parent's] proceeding, through counsel, with their appeal on [their child's] behalf." *Cavanaugh*, 409 F.3d at 757.

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE THAT THREATENS THE EFFECTIVE ENFORCEMENT OF THE IDEA

The question presented is recurring and of exceptional importance. That the issue is recurring cannot be denied. In the three months since the Sixth Circuit issued the order dismissing petitioners' appeal, at least two district courts have ordered the dismissal of IDEA cases based on *Cavanaugh*. *See C.O.*, 2005 WL 3507983, at *8-*10 (dismissing action because non-lawyer parents were prosecuting case *pro se*); *Hart v.*

Shelby County Sch. Dist., No. 03-2845 DV, 2005 WL 2991480, *3 (W.D. Tenn. Nov. 7, 2005) (same). Additionally, the issue is presently awaiting decision in at least one pending appeal and one pending district court proceeding. *See, e.g.*, Brief of Petitioners-Appellants, *Russell v. Dep't of Educ., State of Hawaii*, No. 04-15482 (CA9 Jul. 16, 2004), *available at* 2004 WL 1948965 (urging reversal of dismissal of IDEA case for failure to secure counsel); Def. Mot. S.J., *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005), *available at* 2005 WL 2979427 (urging summary judgment on basis that parents cannot prosecute IDEA case *pro se*).[10]

Nor can it be denied that the issue is exceptionally important. The IDEA is structured in such a way that the rights of a disabled child are to be pursued by his or her parents in their own name or in the child's name. Congress and the courts have depended on parents to press their child's interests and have commanded schools and educational agencies to get parents involved on the assumption that parental involvement is the best way to ensure maximum protection for the child.

Parents of disabled children, however, face significant difficulties in obtaining counsel to prosecute their IDEA disputes. First, the "majority of lawyers in private practice in the United States work in law firms that represent institutions, not people." David C. Vladeck, *In re Arons: The Plight of the "Unrich" In Obtaining Legal Services*, *in* Legal Ethics: Law Stories 255, 258 (Deborah L. Rhode & David J. Luban eds., 2005). Second, even those lawyers who are willing to represent individuals are often too expensive for the average "unrich" American. *Id.* at 259. That is,

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[10] The public dockets in these cases show that the issue has not been ruled upon as of the filing of this petition. Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of them.

> for many Americans legal services are generally unavailable, not by reason of poverty (because most of these people are not poor) but simply because they are not sufficiently wealthy to afford the high cost of legal services. * * * Indeed, many Americans cannot afford anything but the most routine legal services (e.g., preparation of a will).

Id.; *see also* Paula L. Hannaford-Agor, *Helping the* Pro Se *Litigant: A Changing Landscape*, 39 Ct. Rev. 8, 8 (2003) ("The major contributing factor to the increase in self-representation is fairly obvious: a sizeable number of self-represented litigants proceed without a lawyer simply because they lack sufficient income to afford one.")

The IDEA "govern[s] the provision of special education services to nearly 7 million children across the country." *Schaffer*, 126 S. Ct. at 531 (citing Dept. of Education, Office of Special Education Programs, Data Analysis System, http://www.ideadata.org/ tables27th/ar_aa9.htm). Of these 7 million children, 36% live in households with incomes of $25,000 or less, and 32% live in households with incomes of $50,000. *See* Mary Wagner et al., *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002), http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf. For the overwhelming majority of these families, like the Winkelmans, the cost of retaining a lawyer is prohibitive. The prospect of recovering attorneys' fees is a partial incentive at best, as they are awarded only to prevailing parties.

Thus, the primary effect of the decision below – and, in cases where parents do not have their own procedural claims, the decisions of the Second, Third, Seventh, and Eleventh Circuits – will be to prevent parents who need to contest

insufficient administrative findings from protecting their children's interests in court. More dramatically, though probably less-frequently, the decision below will allow school districts that lost at the administrative level to obtain *de facto* reversal if they seek judicial review of adverse administrative findings in court and then secure a default judgment against the prevailing parents because the parents are unable to obtain a lawyer to help them defend their administrative-level victory. Both of these scenarios will undermine the effective enforcement of the IDEA.

To this end, it is no surprise that the Senate committee charged with studying and analyzing the IDEA – the Senate Committee on Health, Education, Labor, and Pensions – devoted significant attention to the issue when the IDEA was due for reauthorization in 2004. Specifically, the Committee recognized that

> there has been disagreement as to whether a parent may, in effect, "represent" their child in a civil action that results from an appeal of a due process hearing. The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have decided this issue based upon a distinction between procedural and substantive claims brought by a parent.
>
> * * * *
>
> Based on current statutory language and on the rich legislative history emphasizing the importance of parental involvement, the committee believes that parents have a right to represent their child in court, without a lawyer,

> for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues.[11]

S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003).

III. NEITHER THE DECISION BELOW, NOR THE DECISIONS OF THE SECOND, THIRD, SEVENTH, AND ELEVENTH CIRCUITS, CAN BE RECONCILED WITH THE A PLAIN READING OF THE IDEA'S STATUTORY TEXT

As the First Circuit has recognized, "[o]n a plain reading of the statute," parents are "parties aggrieved" within the IDEA's right-to-sue provision, 20 U.S.C. § 1415(i)(2)(A). *Maroni*, 346 F.3d at 251. The right-to-sue provision of IDEA, 20 U.S.C. § 1415(i)(2)(A), provides that "[a]ny party aggrieved by the findings and decision made [in a due process hearing] * * * shall have the right to bring a civil action * * * in a district court of the United States." In IDEA cases, federal courts review the outcome of due process hearings. The IDEA grants parents the right to invoke those due process hearings under subsections (f) and (k): "Whenever a complaint has been received * * *, the parents involved in such complaint shall have an opportunity for an impartial due process hearing." 20 U.S.C. § 1415(f)(1). "If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing." 20 U.S.C. § 1415(k)(6)(A)(i). Other sections of the IDEA also refer to

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[11] The Committee's statements were made in support of a proposal to "clarify" and "make clear" "that a parent of a child with a disability may represent the child in any action * * * in State or Federal court, without the assistance of an attorney." S. Rep. No. 108-185, at 42. Ultimately, however, the Committee's clarifying proposal was not enacted.

parents' right to a due process hearing. *See* 20 U.S.C. § 1415(e)(2)(A)(ii) (requiring that mediation not be used to "deny or delay a parent's right to a due process hearing"). Under the IDEA, states may permit parents to transfer this right to a due process hearing to their child only after their child reaches the age of majority. *See* 20 U.S.C. § 1415(m)(1)(B). Because the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of "parties aggrieved" given the right to sue.

This reading is buttressed by the provisions of the IDEA that allow appeals to the state educational agency. When a due process hearing is conducted before a local educational agency, 20 U.S.C. § 1415(g) permits "any party aggrieved by the findings and decision rendered in such a hearing [to] appeal such findings and decision to the State educational agency." As the First Circuit noted, in interpreting § 1415(g), numerous courts have treated parents as "parties aggrieved" within the meaning of § 1415(g). *See Maroni*, 346 F.3d at 251-52 (collecting cases). If parents are "parties aggrieved" by due process hearings when seeking to appeal to a state administrative agency, then, logically, they are also parties aggrieved by due process hearings when seeking judicial review. There is no reason why the term "party aggrieved" should have a different meaning in § 1415(i) than in § 1415(g).

This interpretation is further supported by the requirement of administrative exhaustion. Generally, the right to bring an IDEA action under 20 U.S.C. § 1415(i)(2)(A) is subject to the condition precedent that an "aggrieved party" must exhaust administrative remedies, although there are exceptions. By statute, it is the parents who may invoke those administrative remedies. *See* 20 U.S.C. § 1415(f)(1). It would make little sense if the parents who are explicitly permitted to invoke those administrative remedies and to exhaust them could not be parties for purposes of bringing suit.

The Third Circuit held that, if Congress had intended the term "party aggrieved" under IDEA to mean parents, it would have explicitly said so. *Collinsgru*, 161 F.3d at 232. Congress did explicitly say that parents could bring due process hearings, and so, according to *Collinsgru*, the rule of *expressio unius est exclusio alterius* means that Congress did not intend parents to be able to sue. *See id.* This rule has no application here. Congress needed to include several categories of plaintiffs – school districts, parents, and children – and so used a collective term. The IDEA does not refer to "child aggrieved" as it easily could if only the child could sue. Nor does § 1415(i)(2)(A) refer to school districts, even though they may seek review under it. The only plausible explanation for the IDEA's use of the term "party aggrieved" instead of "parents" is that Congress sought to confer the right to judicial review of due process hearings upon all parties involved in such hearings: school districts, parents, and children.

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED

A. The Issue Presented Was Squarely Decided Below, There Are No Impediments to this Court Granting Petitioners the Relief They Seek, and the Circuit Split Over the Issue Is Now Mature and Ripe for this Court's Review

This case presents an appropriate vehicle to resolve the question presented. The issue was squarely presented and resolved below; indeed, it was the only issue decided in the order that would be the subject of this Court's review. Moreover, petitioners would manifestly benefit from a ruling their favor, inasmuch as it would allow them to avoid dismissal solely because they are unable to afford a lawyer and continue to prosecute their appeal.

Additionally, this case is a far more suitable vehicle than the two previous cases presenting the issue where review was sought. *Devine* was the first appellate decision to confront the issue. Accordingly, as the *Devine* petitioners conceded themselves, there was no inter-circuit conflict. *See* Pet. for Cert. 10, *Devine v. Indian River County Sch. Bd.* (No. 97-929) ("[W]e cannot represent that there is a square conflict.").

The same is true with respect to *Wenger*, which was decided just seven months after *Devine* and was the third of three consecutive appellate decisions to confront the issue and decide it the same way. *See generally* Pet. for Cert., *Wenger v. Canastota Cent. Sch. Dist.* (No. 98-7722).

In stark contrast, a square conflict among the circuits has developed in the nearly eight years since the *Devine* and *Wenger* petitions were filed. *See supra* at 11-13. That three-way split is mature and ripe for this Court's intervention. *See supra* at 11-13.

B. Supreme Court Rule 11 Should Not Apply Because This Case Is Not a True Case of Certiorari Before Judgment

Supreme Court Rule 11 states that this Court will grant certiorari "before judgment is entered in [a court of appeals] * * * only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." We anticipate that respondent will argue that Rule 11 makes this case an inappropriate vehicle for deciding the question presented because, in opposing petitioners' stay application, respondent did so.[12]

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[12] Justice Stevens, who applied the traditional four-factor test for a stay pending certiorari – one factor of which is whether there is a "reasonable probability" that certiorari will be granted, *see California v. Am. Stores Co.*,

(continued...)

Crucially, this case is not a "true case of certiorari before judgment" because it "did not bypass the court of appeals." James Lindgren & William P. Marshall, *The Supreme Court's Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 267; *see also id.* at 277 ("Certiorari before judgment is designed to permit the Court to * * * bypass[] the court of appeals."); Robert L. Stern et al., Supreme Court Practice § 4.20, at 262 (8th ed 2002) (noting that certiorari before judgment is traditionally considered to involve "skipping the court of appeals").[13] Rather, in this case, certiorari is sought to review an order that originated in the court of appeals. Accordingly, this petition is more akin to one that seeks review of an interlocutory district court order over which the court of appeals has already passed than it is to a certiorari before judgment case. In both a traditional interlocutory review case and in this case, no intermediate court is being bypassed and no court other than this Court can afford relief.

While we recognize that certiorari from interlocutory appeals is disfavored, *see, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Estelle v.*

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[12] (...continued)
492 U.S. 1301 (1989) (O'Connor, J., in chambers) – when he granted petitioners' stay application, apparently did not believe that Rule 11 was this petition's death knell.

[13] Indeed, our survey of cases in which this Court has granted certiorari before judgment show that, in all but one case, certiorari was sought to bypass the court of appeals entirely. In other words, in all but one case, certiorari before judgment was sought to review the district court's judgment – not an interlocutory decision of the court of appeals. The one exception is *Barefoot v. Estelle*, 463 U.S. 880 (1982) (reviewing court of appeals' denial of certificate of probable cause and stay of execution before court of appeals had reviewed the merits of the district court's denial of petitioner's underlying habeas petition).

Gamble, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting) (referring to "the Court's normal practice of denying interlocutory review"), "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review." Stern et al., *supra*, § 4.18, at 260; *see also id.* § 4.18, at 259 (noting that when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status"). Accordingly, this Court has not hesitated to review an interlocutory judgment of a court of appeals when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893); *see also, e.g., Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (granting certiorari to review interlocutory order where "effect of the order is immediate and irreparable, and any review by this Court of the propriety of the order must be immediate to be meaningful"); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (reviewing court of appeals' reversal of a district court's denial of a motion to dismiss a complaint because "fundamental to the further conduct of the case").

This case clearly presents an issue which is "fundamental to the further conduct of the case." *Land*, 330 U.S. at 734 n.2. Absent this Court's intervention, petitioners will have to choose between either (a) allowing the court of appeals' dismissal order to become final so they can once again petition this Court for review or (b) obtaining a lawyer that they cannot afford and moot any future opportunity to test their belief in their right to prosecute their appeal *pro se*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2, 2006

APPENDIX A

No. 05-3886

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JACOB WINKELMAN, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN,

Plaintiffs-Appellants,

v.

PARMA CITY SCHOOL DISTRICT,

Defendant-Appellee.

(Filed November 4, 2005)

ORDER

Before KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

The matter is before the court upon consideration of appellee's motion to dismiss the appeal unless the appellants obtain counsel. The appellants filed a response to which the appellee replied.

Jeff Winkelman and Sandee Winkelman brought this action under the Individuals with Disabilities Education Act (IDEA) on behalf of their son, Jacob. As established in this

court's order filed on September 20, 2005, in related appeal No. 04-4159, Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*. *See Cavanauh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756-57 (6th Cir. 2005).

Accordingly, in conformity with *Cavanaugh*, 409 F.3d at 757, this appeal is dismissed unless within thirty days of the entry of this order an appearance of counsel is entered in this appeal to represent Jacob.

ENTERED BY ORDER OF THE COURT

/s/ [Leonard Green]
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACOB WINKELMAN, ET AL.,

Plaintiffs,

vs.

PARMA CITY SCHOOL DISTRICT,

Defendant.
_____/

CASE NO. 1:04CV1329

(Filed June 2, 2005)

Judge John M. Manos

MEMORANDUM OF OPINION

On March 2, 2005, Plaintiffs, Jeff, Sandee, and Jacob Winkelman (collectively, the "Winkelmans") filed a Motion for Judgment on the Pleadings Based on the Administrative Record.[1] (Docket No. 35.) On March 17, 2005, Parma City School District ("Parma") filed a Motion for Judgment on the Pleadings Based on the Administrative Record. (Docket No. 38.) The issue on appeal is whether or not Parma provided Jacob Winkelman with a free appropriate public education

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[1] The Winkelmans actually filed a motion for summary judgment. However, because neither party has expressed a desire to supplement the record, a motion for summary judgment is inappropriate. Dong ex. rel. Dong v. Board of Educ., 197 F.3d 793, 798-99 (6th Cir. 1999). Although the Winkelmans initially sought to supplement the record, their counsel clarified that the request was simply intended to bring to the Court's attention new Sixth Circuit case law. Thus, because the Winkelmans believe that all the necessary facts are set forth in the administrative record, (Brief, Docket No. 35, at 5), the Court will construe their motion as one for judgment based on the administrative record. See id. at 799.

("FAPE")[2] as mandated under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et. seq., and analogous state law, O.R.C. § 3323.01 et. seq. The Court has jurisdiction under 28 U.S.C. § 1331.

All issues have been fully briefed and are ripe for adjudication. For the following reasons, the Winkelmans' Motion for Judgment on the Pleadings Based on the Administrative Record is **DENIED** and Parma's Motion for Judgment on the Pleadings Based on the Administrative Record is **GRANTED**.

I. FACTUAL BACKGROUND

Plaintiffs are Jacob Winkelman, a seven-year old boy diagnosed with autism, and his parents, Jeff and Sandee Winkelman. In July of 2001, Jacob attended preschool at the Achievement Center for Children ("Achievement Center"). Parma paid for this program because Jacob did not respond well to its own program. Achievement Center offers a special education intervention program including physical therapy, occupational therapy, speech therapy, and music therapy.

On September 1, 2001, Parma school officials met with the Winkelmans to discuss an Individualized Education Program ("IEP")[3] for Jacob. The parties agreed that Achievement Center was an appropriate placement for the 2001-02 and 2002-03 school years.

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[2] A "free, appropriate public education" consists of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Board. of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982).

[3] An "individualized education program" details the services "tailored to the unique needs of the handicapped child." Rowley, 458 U.S. at 181.

On June 2, 2003, the parties met to discuss Jacob's IEP for the 2003-04 school year. The 2003-04 IEP proposed educating Jacob in a special education classroom at Pleasant Valley Elementary School ("Pleasant Valley"). Pleasant Valley is a public school that offers speech and occupational therapy and would provide Jacob with an opportunity to interact with six other students with varying disabilities. The educators at Pleasant Valley are trained to educate children with autism.

The Winkelmans were unhappy with the proposed 2003-04 IEP. Specifically, they complained that the proposed 2003-04 IEP did not include music therapy, did not contain a sufficient amount of speech therapy nor one-on-one interaction, and did not contain any specific plan to implement the need for occupational therapy. Moreover, they preferred placing Jacob at Monarch School. Monarch School is a private school that specializes only in autism and emphasizes one-on-one interaction between students and educators with limited peer interaction. Nonetheless, the Winkelmans signed the proposed 2003-04 IEP and although they objected to his placement, they consented to the initiation services. (Parma's Ex. K before IHO, at 157.)

On June 2, 2003, the Winkelmans filed a request for a due process hearing with Impartial Hearing Officer ("IHO") Joy Freda alleging that Parma failed to provide Jacob with a FAPE. On August 27, 2003, IHO Freda issued an interim order designating Achievement Center as Jacob's stayput placement. Nonetheless, the Winkelmans unilaterally pulled Jacob from that program and placed him at Monarch School. Jacob performed well at Monarch School during the 2003-04 school year. However, because of the expense of private education, they did not enroll Jacob in Monarch School for the 2004-05 school year. Presently, Jacob is not enrolled at any school but does participate in a one-to-two hour a week outreach program at Monarch School.

On February 25, 2004, IHO Freda issued a fifty-six page decision finding that Parma provided Jacob with a FAPE and thus, did not violate the mandates of the IDEA. The Winkelmans appealed to State Level Review Officer ("SLRO") Theresa L. Hagen. On June 2, 2004, she issued a forty-four page opinion affirming IHO Freda's decision.

On July 15, 2004, the Winkelmans appealed to this Court. On March 2, 2005, they filed the current motion for judgment on the pleadings based on the administrative record. They are seeking reversal of SLRO Hagen's decision and reimbursement for educating Jacob at Monarch School. On March 27, 2005, Parma filed the current motion for judgment on the pleadings based on the administrative record. It is seeking affirmance of SLRO Hagen's decision in its entirety.

II. LEGAL STANDARD

The IDEA's provision governing federal court review over state administrative decisions states: "the court (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(i)(2)(C). To prevail on the merits, a plaintiff must establish either that (1) the state has not complied with the IDEA's procedural mandates, or (2) the proposed IEP is not reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 206-07.

Procedural issues are strictly reviewed for compliance; although technical deviations will not render an IEP invalid. Dong, 197 F.3d at 800. Substantive issues are reviewed under a modified *de novo* standard: although the district court is required to make independent decisions based on the preponderance of the evidence, it must give due weight to the determinations made by state administrators. Knable v.

Bexley City Sch. Dist., 238 F.3d 755, 763-64 (6th Cir. 2001) (quoting Rowley, 458 U.S. at 206). Accordingly, the Supreme Court has cautioned that although the district court should not simply adopt the findings of fact of the state administrators without re-examining the evidence, it may not simply substitute its own notions of sound educational policy for those of the state hearing officers. Rowley, 458 U.S. at 206.

The burden of proof in the Sixth Circuit rests with the party challenging the terms of the IEP. Dong, 197 F.3d at 799. Here, the burden rests with the Winkelmans. They allege three procedural violations and three substantive violations.

III. LAW AND ARGUMENT

A. Procedural Violations

1. Use of Assistant

The Winkelmans argue that IHO Freda violated the procedures set forth in the IDEA by allowing another person to "co-preside" over the proceedings. However, nothing in the record suggests that IHO Freda's research assistant, Ann Oakar, co-presided over the proceedings. Also, nothing in the record suggests that either party objected to the use of a research assistant. To the contrary, IHO Freda's Disclosure Conference Memorandum specifically states that "[a]lso present was Ann Oakar, attorney, an invitee of the hearing officer after consent of both parties." (IHO Ex. 20, at 1) (emphasis added). At the start of the hearing, IHO Freda again asked the parties if there were any procedural errors that might interfere with the proceeding and both parties responded, "no." (IHO Tr. at 14.)

The Winkelmans' citation to O.A.C. § 3301-51-08 is

unavailing. Although O.A.C. § 3301-51-08 details the qualifications and duties of a hearing officer, it does not prohibit the use of a research assistant. Most telling, the Winkelmans are unable to cite a single legal authority that holds that a hearing officer is not allowed to employ a research assistant. Absent any evidence that Ms. Oakar somehow interfered with the process, the Court concludes that the use of a research assistant by an impartial hearing officer does not constitute reversible error.

2. Timing Delay

The Winkelmans argue that because the administrative proceeding went 217 days beyond the 45-day deadline, the procedural requirements of the IDEA were violated. The Ohio Administrative Code, Section 3301-51-08 (G)(1)(a) states that "the Ohio Department of Education shall ensure that not later than forty-five days after the receipt of a request for a due process hearing [a] final decision is reached in the hearing." See also 34 C.F.R. § 300.511(a). Section 3301-51-08(G)(3) authorizes the IHO to grant extensions of time beyond the forty-five day requirement. See also 34 C.F.R. § 300.511(c). Section 3301-51-08(G)(3)(b) states that any "extension of time beyond the forty-five days at the request of either party pursuant to this rule shall not be considered a failure to meet timelines."

Here, the Winkelmans requested a due process hearing on June 5, 2003. Thus, the final decision, filed on February 20, 2004, was well beyond the 45-day deadline. However, the first extension (30 days) was at the request of the Winkelmans so that they could retain counsel. (IHO Exs. 5 & 6.) The second extension (90 days) was at the request of both parties, jointly, so that they could resolve a stay-put placement issue and prepare for the due process hearing. (IHO Exs. 9 & 10.) The third extension (36 days) was, again, at the request of both parties, jointly, so that they could submit briefs. (IHO

Ex. 31.) Thus, under the authority of O.A.C. § 3301-51-08 (G)(3)(b), these delays are not to be considered a failure to meet the 45-day deadline.

The fourth (7 days) and fifth (39 days) extensions were at the request of Parma to allow IHO Freda time to thoroughly consider the record, conduct research, and review the evidence. (IHO Ex. 31.) The Winkelmans did not join in these requests, nor did they offer an objection. Given the size of the administrative record, IHO Freda did not err in granting these two requests for additional time. As IHO Freda correctly stated when granting the last extension, Jacob "remains enrolled at Monarch School, the preferred placement of the parents, and is not adversely impacted by this delay." (IHO Ex. 31.) Although the Court does not condone the delay, the IDEA and the Ohio Administrative Code clearly provide some flexibility upon the filing of a motion for good cause. The Court concludes that all extensions were in response to a motion for good cause and that the delay does not constitute reversible error.

Moreover, the Winkelmans have not shown that the delay caused such substantive harm as to deny Jacob a FAPE. See Deal v. Hamilton County Bd. of Edu., 382 F.3d 840, 854 (6th Cir. 2005) (citing Knable, 238 F.3d at 764). The only harm alleged is financial: "[s]uch delay caused [Jacob's] parents to use up all of their resources for providing [Jacob] with an appropriate education at the Monarch School, which has resulted in [Jacob] not having any services for extended school year services for 2004 and not having any services for the 2004-2005 school year." (Brief, Docket No. 35, at 5.) However, when Jacob was enrolled at Monarch School, a place for him was available at the Achievement Center. In violation of IHO Freda's August 27, 2003 stay-put placement order, the Winkelmans unilaterally pulled Jacob from the Achievement Center and placed him at Monarch School. The Supreme Court has held that "parents who unilaterally change

their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." School Comm. of Burlington, Mass. v. Department of Educ. of Mass., 471 U.S. 359, 373-74 (1985). Thus, any financial harm suffered by the Winkelmans is a result of their own doing and not a result of IHO Freda's delay.

3. Predetermination

The Winkelmans argue that Parma predetermined to place Jacob in its own program prior to developing his 2003-04 IEP. The Sixth Circuit has held that predetermining not to offer a child certain services without effective participation by the parents amounts to a procedural violation of the IDEA and causes such substantive harm as to deprive the child a FAPE. See Deal, 392 F.3d at 855-59. However, the Winkelmans did not raise this issue with IHO Freda, nor with SLRO Hagen. District courts are not authorized to rule upon issues beyond those presented to the IHO and SLRO. Metropolitan Bd. of Pub. Educ. v. Guest By & Through Guest, 193 F.3d 457, 463 (6th Cir. 1999). As the Sixth Circuit reasoned, "[w]ere federal courts to set themselves up as the initial arbiters of the handicapped children's educational needs before the administrative process is used, they would endanger not only the procedural but also the substantive purposes of the Act." Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989). Parma has never had an opportunity to defend itself against allegations of predetermination. Although the Court is authorized to hear new evidence, the Sixth Circuit is clear that new evidence cannot be heard on issues never presented to the IHO or SLRO. Guest, 193 F.3d at 463. Thus, the Court lacks jurisdiction to address this issue.

Even if the Court had jurisdiction, the administrative record does not support an allegation of predetermination.

First, the Winkelmans were able to participate at every step of Jacob's education. They were present at the 2003-04 IEP meetings and consented to the initiation of services. (Parma's Ex. K before IHO, at 154.) Second, Parma readily paid to enroll Jacob at the Achievement Center when it was shown that Jacob was not responding well to its own program. Third, there is no evidence that Parma has a predisposition against placing a child at Monarch School. Mrs. Winkelman did not even begin to consider Monarch School until after the June 2, 2003 IEP meeting. (Tr. at 81.) She also testified that Dr. Judith Hudgins, Parma's Special Education Supervisor, did not discourage her from looking into other programs. (Tr. at 47.) Finally, Susan Rueger, Pleasant Valley's principal, testified that Pleasant Valley would provide any service that Jacob's IEP required. (Tr. at 648-49.)

In short, this is a far cry from the situation in Deal where the Sixth Circuit found (1) numerous procedural and substantive errors, (2) that the school district had an unofficial policy of refusing to consider certain programs regardless of the child's needs, and (3) that the district's main concern was financial. 392 F.3d at 855-59. Indeed, in Deal, the parents were not even allowed to ask questions during the IEP meetings. Id. at 855. Thus, even if the Court had jurisdiction over this issue, the record does not support an allegation of predetermination.

B. Substantive Violations

1. Occupational Therapy

The parties agree that Jacob's 2003-04 IEP did not contain specific goals and objectives for occupational therapy. Instead, it guaranteed to assess Jacob for occupational therapy and mandated that such assessment be completed within thirty days of the new school year. The issue is whether or not a guarantee to assess Jacob for occupational therapy as opposed

to setting forth specific goals and objectives constitutes a substantive violation and denies Jacob a FAPE.

An IEP is defined as a "written statement for a child with a disability that is developed, reviewed, and revised in accordance with section [1414(d)]." 20 U.S.C. § 1401(14). It must include:

> (1) a statement of the present levels of educational performance of the child, (2) a statement of annual goals, including short-term instructional objectives (3) a statement of the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs, . . . (5) the projected date for initiation and anticipated duration of these services, and (6) appropriate objective criteria and evaluation procedures for schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

34 C.F.R. § 222.50 (2005); Cleveland Heights-University Heights City Sch. Dist. v. Boss by & through Boss, 144 F.3d 391, 398 (6th Cir. 1998). "Related services" include "transportation and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26)(A). "Occupational therapy" is considered a "related service." Specifically, "occupational therapy" includes "(1) improving, developing or restoring functions impaired or lost through illness, injury, or deprivation, (2) improving ability to perform tasks for independent functioning if functions are impaired or lost, and (3) preventing, through early intervention, initial or

further impairment or loss of function." 34 C.F.R. § 300.24(5) (2005).

Here, Jacob's 2003-04 IEP identifies his present performance levels for occupational therapy. It also indicates that occupational therapy is a necessary related service. (Parma's Ex. K before IHO, at 157). However, instead of providing annual goals, short-term objectives, and a description of the services to be provided, it only recommends that Jacob be assessed for occupational therapy within the first month of the new school year. Id. at 145; 149. The Winkelmans consented to this portion of the IEP. Id. at 154.

Julia Peacock, Parma's occupational therapist, explained the reason for the delay:

> I was not comfortable writing IEP goals . . . because I had never seen Jacob and was not comfortable writing goals on what the OT currently had goals on because they were things like tying his shoes which at five to six, you should be working on, but he shouldn't actually quite know how to do it yet. It would be good if he could. Cutting out squares and things like that, I really wanted to see where he was at before I put on goals. He might need harder goals, and I really wanted to look at where the problems were occurring instead of just putting on a goal. If it was a sensory problem we needed to attack it from more of a sensory issue and not just cutting on a line.
>
> . . .
>
> This was a new environment, and we weren't sure how he was going to transition. So, there was no point to putting that in until we knew

> how he did in the beginning and figured out how to modify the environment for him. . . . [T]his is very typical; that we think it's best to do it when we get to know the child a little bit and he has been here for a while and we see how he is actually doing and what problems he is having.

(IHO Tr. at 297-98.)

Based on this testimony, IHO Freda concluded that the lack of specific goals and objectives for occupational therapy constituted a procedural technical violation of the IDEA as opposed to a substantive violation. She provided four reasons to support her conclusion. First, she found Ms. Peacock to be a very credible witness who wanted to set new goals for Jacob reflecting his current levels of performance within the scope of his new environment as opposed to simply recycling old goals. Second, she agreed that "the assessment of [Jacob's] abilities and adaptation to his new environment are the most important factors in the creation of appropriate goals and objectives." (IHO decision, at 48.) Obviously, measuring Jacob's level of adaptation to his new school environment required Ms. Peacock to first observe him in his new environment, thus justifying the delay. Third, she concluded that because Jacob's motor skills were on par with the majority of motor skills required for kindergarten-readiness, he would not be significantly impacted by the thirty-day delay. Rather, she found that "the overall impact on the child's long-term progress may be greater with the development of goals and objectives based on timely data and tailored to the child's unique needs." (IHO decision, at 49.) Finally, she noted that the Winkelmans consented to the initiation of services.

Two Sixth Circuit cases are instructive on this point. In Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990), the court

held that an IEP that did not include present educational performance levels and objective criteria for determining whether instructional goals were being met constituted a mere technical violation of the IDEA. The court reasoned that the absent information was known to all parties and that the parents had actually requested the delay so that their child could first adjust to the new experience of middle school. Id. at 1189. Also the court reasoned that emphasis should be placed on "the process by which the IEP is produced rather than the myriad of technical items that must be included in the written document." Id. at 1190.

However, in Cleveland Heights-University Heights City Sch. Dist. v. Boss by & through Boss, 144 F.3d 391 (6th Cir. 1998), the court held that an IEP that did not include objective criteria for determining whether instructional goals were being met constituted a substantive violation of the IDEA and denied the child a FAPE. The court reasoned that the omitted information went to the heart of the substance of the IEP. Id. at 399. Moreover, unlike the situation in Defendant I, the parents refused to approve the IEP. Id. at 394. Also, unlike the situation in Defendant I, both state administrative officers ruled in favor of the parents. Id. at 398. Under the IDEA's deferential standard of review, federal courts are required to give these state administrative decisions due weight. Finally, the Sixth Circuit noted that the school district refused to reassess the IEP until three months after the school year had started. Id.

The Court concludes that the present situation is more akin to the situation in Defendant I than in Boss. First, the absent information was known to the Winkelmans and still, they did not object to the implementation of services. See e.g. Berger v. Medina City Sch. Dist., 348 F.3d 513, 520 (6th Cir. 2003). Second, both state administrative officers ruled in favor of the school district and their decisions require some deference. Third, the reason for the delay was to allow Jacob

time to adjust to his new school environment. Finally, unlike the three month delay in Boss, Parma agreed to re-assess Jacob within the first month of the new school year.

The Winkelmans argue that affirming the decisions of the state administrative officers "will set a dangerous precedent allowing school administrators to place handicapped children in school without first developing the statutorily mandated goals and objectives and without first detailing the provisions for services to be provided." (Brief, Docket No. 35, at 13.) They raise a valid concern. Indeed, IHO Freda stated that identifying a needed service and then delaying the creation of goals and objectives is not the "preferred practice." (IHO Decision, at 48.) Nonetheless, the entire IEP team (with initial consent by the Winkelmans) and both state administrative officers all agreed that the one month delay was in the best interest of Jacob. The Court must give these determinations due weight. Knable, 238 F.3d at 763-64 (quoting Rowley, 458 U.S. at 206).

In doing so, the Court does not wish to make light of the procedural and substantive requirements of the IDEA. However, given that Jacob was entering a completely new school setting and given the overall consensus that the one-month reassessment was in his best interest, the Court concludes that the lack of goals and objectives for occupational therapy only constitutes a procedural technical violation of the IDEA and not reversible error. As the Sixth Circuit stated, to say that such technical deviations render an IEP invalid "is to exalt form over substance." Defendant I, 898 F.2d at 1190.

2. Speech Therapy and Academics

The Winkelmans argue that the reduction of speech therapy from 90 minutes to 60 minutes and the lack of one-on-one academic instruction constitutes a substantive

violation of the IDEA and denies Jacob a FAPE.

"Speech-language pathology services" is considered a "related service" and includes "(1) identification of children with speech and language impairments, (2) diagnosis and appraisal of specific speech and language impairments, (3) referral for medical or other professional attention necessary for the habilitation of speech or language impairments, (4) provision of speech and language services for the habilitation or prevention of communicative impairments, and (5) counseling and guidance of parents, children, and teachers regarding speech and language impairments." 34 C.F.R. § 300.24(14) (2005).

There is no dispute that the 2003-04 IEP, with regard to speech therapy, satisfies the requirements of 34 C.F.R. § 222.50. The only issue is whether or not Jacob can receive some educational benefits from 60 minutes of speech therapy.

The recommendation of 60 minutes per week came from Michelle Munci, Parma's speech language pathologist:

> I can tell you what I thought when I wrote 60 minutes. Jacob being placed in the classroom, he would be receiving speech, and these goals would be carried through throughout his entire day anyway just like it was at the Achievement Center. I felt I needed the 60 minutes to do more specialized training, but that he would still be receiving speech contact because the teachers carry through these things the entire day. They are very language classrooms.

(Tr. at 282.) She based her conclusions on (1) discussions with Jacob's teacher and speech pathologist at Achievement Center, (2) data from the Achievement Center and Parma, and (3) personal observations. (Tr. at 286-87.)

No evidence in the record suggests that Jacob requires 90 minutes of speech therapy per week to receive educational benefits. Although he was receiving 90 minutes per week at the Achievement Center, that was the standard amount for all children there. (Tr. at 473-74.) As IHO Freda correctly noted, the fact that Jacob was progressing with 90 minutes of speech therapy at the Achievement Center does not mean that 60 minutes would offer him no educational benefits. (IHO decision, at 46.) Obviously, more time would most likely produce more results, but as the Sixth Circuit stated, a school district is only required to "provide the educational equivalent of a serviceable Chevrolet . . . [i]t is not required to provide a Cadillac." Doe v. Board of Educ. of Tullahoma City Sch., 9 F.3d 455, 459-60 (6th Cir. 1993). Absent any evidence that Jacob actually needs 90 minutes of speech therapy per week to receive educational benefits, IHO Freda did not err in concluding that 60 minutes would still provide Jacob a FAPE.

The Winkelmans also take issue with the lack of one-on-one academic training in Jacob's 2003-04 IEP. This issue goes to the heart of the dispute between the parties. Parma prefers placing Jacob at Pleasant Valley, which focuses on peer interaction. The Winkelmans prefer placing Jacob at Monarch School, which provides almost no opportunity for peer interaction.

Julie d'Aliberti, Pleasant Valley's kindergarten teacher, testified that "as far as [Jacob's] social and communicative needs, it appears that he would mesh very well with the other students in my classroom due to what I know their needs are and what their levels are." (Tr. at 546.) Michelle Munci, Parma's speech language pathologist, testified that Jacob was successful in small group activities when she observed him at Achievement Center. (Tr. at 269.) She concluded that Jacob would perform well at Pleasant Valley because "he needs to learn how to interact better with peers." (Tr. at 275-76.) All of the witnesses unanimously agreed that learning to interact

with peers is one of Jacob's most important needs. (Munci, Tr. at 275-76; Gerber, Tr. at 461; Lumadue, Tr. at 247; Mendell, Tr. at 198; Alspach, Tr. at 159.) As Amy Marie Lumadue, a mental health therapist at Beech Brook Mental Health Center, aptly stated, "life is not a one on one setting." (Tr. at 255.)

Although Jacquelyn Gerber, Jacob's preschool teacher at the Achievement Center, Ms. Lumadue, Debra J. Mandell, director at Monarch School, and Jaime Alspach, a music therapist at Music Therapy Enrichment Center, all testified that Jacob tends to learn better in a one-on-one setting, (Tr. at 436-37, 249-50, 198-99, 151), none of these witnesses testified that Jacob needs a one-on-one setting to receive educational benefits. To the contrary, Ms. Gerber conceded that Jacob could succeed at Pleasant Valley if the program remained structured. (Tr. at 464-65.) Ms. Mendell conceded that Jacob was doing well in his small group instruction period and that he could learn from a program that included more peer interaction. (Tr. at 199, 214.) Finally, Ms. Alspach stated that Jacob enjoyed being with his peers and that he would certainly benefit from more peer interaction. (Tr. at 151, 159.)

The only witness who was adamant that Jacob needed one-on-one interaction to receive any educational benefits was Dr. Morris Levinsohn, Jacob's pediatric neurologist. He gave his "firm medical recommendation" that one-on-one instruction was critical for Jacob to be successful in a school setting. (Tr. at 314, 342-43.) IHO Freda was not persuaded by his testimony. She reasoned that he is not an educator, he only had limited personal interaction with Jacob, and he had never observed Jacob in a classroom setting. More importantly, most of his information regarding Jacob came from the Winkelmans. For example, he only recommended music therapy because the Winkelmans told him that Jacob likes music. (Tr. at 326.)

In evaluating all of this evidence, IHO Freda made the following conclusions:

> Again, there is no evidence that the child needs a set amount of one-on-one instructional time to receive a [FAPE]. While it is in fact a truism that any child would receive educational benefit from significant amounts of one-to-one instruction, the IDEA does not require an ideal education or the best education available for a certain child.
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> . . .
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> The school district's proposed placement of the child for the 2003-2004 school year involves a special education classroom consisting of six to eight students with a teacher and two aides. One-to-one and small group instruction would be provided throughout the day; in addition, the child would be exposed to both disabled and nondisabled peers and would be afforded the opportunity to generalize his social and language skills across diverse environments.
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> . . .
>
> Pleasant Valley Elementary School is not only appropriate as the least restrictive environment, but is clearly preferable to the parents' choice of Monarch School where the child is instructed in a one-on-one environment for the greater part of the day.

(IHO Decision, at 42-45) (emphasis added.)

Given the overwhelming consensus that Jacob needs more peer interaction and that he would receive some educational benefits from Pleasant Valley, the Court concludes that IHO Freda did not err in finding that Pleasant Valley is an appropriate placement for Jacob, despite the reduced amount of one-on-one instruction. Also, contrary to the Winkelmans' assertion, IHO Freda was not required by law to rely Dr. Levinsohn's testimony. Rather, she was well within her right to disregard it based on his lack of expertise in education, his limited personal interaction with Jacob, and the fact that he never observed Jacob in an educational setting. Indeed, a finding of witness credibility is seldom subject to review. See United States v. Gessa, 57 F.3d 493, 496 (6th Cir. 1995).

3. Music Therapy

The Winkelmans argue that the lack of music therapy in Jacob's 2003-04 IEP constitutes a substantive violation of the IDEA and denies Jacob a FAPE. Music therapy is a "related service" and only necessary if the child needs the service to receive educational benefits. Neeley v. Rutherford County Sch., 68 F.3d 965, 969 (6th Cir. 1995). Music therapy was provided for in Jacob's 2001-02 IEP and 2002-03 IEP (Parma's Exs. G and I before IHO). However, no music therapy was provided for Jacob in his 2003-04 IEP. The question is whether or not Jacob needs music therapy to receive educational benefits.

Jaime Alspach, Jacob's music therapist at the Music Therapy Enrichment Center, testified that music therapy was put into Jacob's 2001-02 IEP and 2002-03 IEP because

> [I]t was shown that music was motivating to him, provided structure to him that allowed to work better on his objectives, and from anecdotal data as well as data we saw, he was

> often performing better on IEP objectives within the music setting than in a nonmusic setting, perhaps the speech or with a teacher.

(Tr. at 156.) However, she conceded that it was not necessary to sing to Jacob for him to understand things. (Tr. at 157.) Mary Beth Koss, the manager of the education department at the Achievement Center, and Ms. Gerber, Jacob's preschool teacher, both agreed that although music therapy certainly aided Jacob, he could still learn outside the music therapy context and pick up skills without the use of music. (Tr. at 398, 450.) Contrary to the Winkelmans' claim, neither Ms. Mendell from Monarch School nor Ms. Lumadue from Beech Brook testified that Jacob needs music therapy to receive educational benefits. The only witness who testified as such was Dr. Levinsohn. The Court has already concluded that IHO Freda was permitted to disregard his testimony because his recommendation was not based on any personal observations but solely on the fact that he was told that Jacob likes music. (Tr. at 325-26.) Moreover, Dr. Levinsohn is not an expert in education.

It is quite evident that Jacob loves and responds well to music. (McNulty, Tr. at 100; Alspach, Tr. at 147; MacGuire, Tr. at 175; Lumadue, Tr. at 251; Gerber, Tr. at 421, 450, 469.) Fortunately, Jacob's would-be teacher at Pleasant Valley incorporates music into her lesson plans. (Tr. at 529.) Also, Pleasant Valley offers an adaptive music class geared for children with autism. (Tr. at 496.) These services should be very beneficial to Jacob. However, the record does not support the notion that Jacob needs music therapy to receive educational benefits. The only witness to testify to that effect was Dr. Levinsohn, whose testimony was permissibly disregarded by IHO Freda. Thus, the fact that Jacob's 2003-04 IEP did not include music therapy does not constitute reversible error nor deny him a FAPE.

IV. CONCLUSION

For the following reasons, Plaintiffs' Motion for Judgment on the Pleadings Based on the Administrative Record (and request for reimbursement) is **DENIED**; and Defendant's Motion for Judgment on the Pleadings Based on the Administrative Record is **GRANTED**. Each party to bear its own costs.

IT IS SO ORDERED.

Date: June 2, 2005 */s/* ***John M. Manos***
UNITED STATED
DISTRICT JUDGE